Wildlife: Defining the Animals the Dene Hunt and the Settlement of Aboriginal Rights Claims

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Cet article concerne l’impact de la terminologie relative aux concepts et aux intérêts des groupes aborigènes telle qu’utilisée dans les conventions des revendications territoriales. Plus spécifiquement, nous examinons si le mot ‘faune’ décrit bien le concept que les Dené/Métis ont des animaux qu’ils chassent. Il est suggéré qu’il existe d’autres alternatives que le terme ‘faune’ qui sont conciliables avec les idées euro-canadiennes et fournissent une meilleure approximation des perceptions et de l’intérêt que les Dené/Métis ont pour ces animaux. Cet article se conclut en arguant que l’impasse d’adopter une terminologie plus appropriée ne réside pas dans la recherche de concepts parallèles, mais plutôt dans le manque de volonté politique de la part des gouvernements canadiens afin d’incorporer une telle terminologie dans leurs conventions.

This article concerns the impact of terminology used in land claims agreements on the concepts and interests of aboriginal parties. Specifically, it examines how well the word ‘wildlife’ describes the Dene/Metis concept of the animals they hunt. It suggests that alternatives exist that are reconcilable to Euro-Canadian ideas and provide a better approximation of Dene/Metis perceptions and interests in these animals than does the term ‘wildlife’. The article concludes by arguing that the impasse to adopting more appropriate terminology lies not in finding conceptual parallels but rather in the lack of political will on the part of Canadian governments to incorporate such terminology into these agreements.

Introduction

Since the release of the federal government's first land claims policy in 1973 (Chretien, 1973), the Canadian state has entered into negotiations with various aboriginal nations concerning outstanding aboriginal rights claims. These negotiations have pertained both to political rights and to matters concerning ‘property’ and ‘compensation’. After two subsequent reviews of the policy (DIAND, 1981; 1986), a total of three comprehensive land claims settlements have been completed: the 1975 James Bay Agreement with the Cree and Inuit of Quebec (Quebec, 1975); the 1978 agreement with the Naskapi of Schefferville, Quebec (DIAND, 1978) and the 1984 COPE (Committee for Original Peoples Entitlement) agreement with the Inuvialuit of the Western Arctic (DIAND, 1984). The most recently signed Agreement in Principle, expected to lead in 18 to 24 months to a completed land claims agreement, is that of the Dene and Metis of the Mackenzie River Valley (DIAND, 1988). This paper is concerned with one aspect of the Dene/Metis agreement.

My discussion centres on one set of clauses that appears in this and all other
'land claims agreements'. It is the 'Wildlife' or 'Harvesting' Agreement. In it, certain specific rights for the aboriginal party are codified. However, as I intend to show, the framework within which these clauses (and by extension others in this and other agreements) are written renders them suspect with respect to aboriginal concepts and interests.

The particular focus of the paper will be to examine how accurately the use of the word 'wildlife' in these agreements reflects Dene concepts and perceived interests with respect to the animals they harvest. Its public policy intent will be to show that the idea that the animals hunted by the Dene are 'wildlife' as this term is defined within Euro-Canadian folk ideology is inaccurate and that alternatives exist within Euro-Canadian law which will more closely accommodate these concepts and interests. To this end, the paper will begin by describing the Dene/Metis Harvesting Agreement. It will then discuss the term 'wildlife' as it exists in Euro-Canadian folk and legal ideology. Following a comparison of this term with the concepts and interests of the Dene/Metis, a number of practical alternatives to enrich the definition of the animals with respect to the harvesting rights of the Dene, Metis (and presumably other aboriginal hunters) will be evaluated. The paper concludes with the suggestion that the impediment to the adoption of options that most closely fit aboriginal concepts and/or interests does not lie in the notion that their idea about the animals they harvest is too different, too vague (or even too primitive) to be of value in defining rights within a sophisticated, complex society. Rather, it is the opposite: their ideas about the animals they hunt, like their ideas about self-government, represent a challenge to the current distribution of political power. Hence, the resolution of this issue in a manner most acceptable to the fundamental principles of aboriginal peoples does not require new concepts, but may require a willingness on the part of government to redistribute existing constitutional power to include aboriginal nations as full partners in Confederation.

The Dene/Metis Harvesting Agreement

There are three definitions contained in the Definitions Sections of the Dene/Metis Agreement-in-Principle (AIP) (DIAND, 1988:2-4) which are of relevance to understanding the intent of the harvesting section:
1. 'Harvesting' is defined as: 'gathering, hunting, trapping or fishing in accordance with this agreement or applicable legislation'.
2. 'Wildlife' is said to mean: 'all ferae naturae in a wild state including, fish, mammals, and birds'.
3. 'Conservation' is said to mean: 'the management of wildlife populations and habitat to ensure the maintenance of the quality and diversity including the long term optimum productivity of those resources, and to ensure a sustainable harvest and its efficient utilization'.

Turning with the above in mind to the provisions for Harvesting spelled out in Section 13 (DIAND, 1988:52-94) we find that it begins with a set of objectives of which the major one is: '(a) to protect for the future the right of the Dene/Metis to gather, hunt, trap and fish throughout the settlement area (or their traditional lands) at all seasons of the year' (ibid.:52). This, however, is immediately followed by a second objective which is: '(b) to conserve and protect wildlife and wildlife habitat and to apply conservation principles and practices through planning and management'. Thus, we can say that there is a twin purpose to the Agreement: harvesting rights for the Dene/Metis and conservation or the need to ensure the continued existence of the various species found in the settlement area.

In order to achieve the harvesting objective, the Agreement calls for a number of guarantees for Dene/Metis harvesters. In the first place, contrary to the norms of lib-
eral-democratic ideology, the AIP identifies the Dene/Metis as a special kind of user to be distinguished from non-Native harvesters. Second, it provides practical guarantees for the rights of the Native users. These include the following:

to provide the Dene/Metis with certain exclusive, preferential and other harvesting rights and economic opportunities related to wildlife;

to respect the harvesting and wildlife management customs and practices of the Dene/Metis and provide for their on-going needs for wildlife;

to involve the Dene/Metis in a direct and meaningful manner in the planning and management of wildlife and wildlife habitat.

The first method used to achieve these objectives is the specific identification of species over which and lands where the Dene/Metis can exercise their rights under point (c) above. Thus, for example under Section 13.4.5 it is agreed that the Dene/Metis (ibid.:54f):

will have the exclusive right to harvest moose within such Dene/Metis moose harvesting areas as may be established, except during a season in the fall of the year when resident non-participants (that is non-Dene or Metis) may harvest moose in such areas in accordance with legislation. The season shall be no longer than 90 days in duration and shall close no later than the 16th day of December in any calendar year.

The second method is the establishment of a Wildlife Management Board (called ‘the Board’). This Board is to be composed of 11 members. Five of the members will be taken from a list of nominees supplied by the Dene/Metis and the other five from nominees put forward by ‘government’ (the AIP has yet to specify in this case whether ‘government’ means the federal government, the government of the Northwest Territories, or a combination of the two). The 11th, to be the Chairman, will be nominated jointly by the other 10. However, if no agreement is reached, s/he will be appointed jointly by the Minister of Indian Affairs and Northern Development and the Northwest Territories’ Minister of Renewable Resources (ibid.:75).

The purpose of the Board will be to manage wildlife in the settlement area in accord with the Dene/Metis AIP and in particular in accord with the objectives as laid out in the Harvesting Section (ibid.:74). The definition of management includes the right to limit the quantity of the Dene/Metis harvest. For example, the Board may establish a ‘total allowable harvest level’. If it does so, it must then establish a ‘Dene/Metis needs level’ which is based on an assessment of Dene/Metis requirements for a particular species. This needs level then becomes the first requirement on the total allowable harvest level’. Once the ‘Dene/Metis needs level’ has been determined, the Board may allocate any surplus to non-participants. Of these, the first call would be for those who are long-term residents and who rely on wildlife for food; the second would be the demand for hunting and sport fishing by other residents and the third, non-residents (ibid.:67).

The Board, however, may restrict Dene/Metis harvesting only in accord with procedures set out in the Agreement. In particular, it can act to ‘establish, modify or remove total allowable harvest levels’ only ‘if required for conservation and to the extent necessary to achieve conservation’ (ibid.:61). Under such conditions, it can restrict Dene/Metis harvesting to a level below their needs (and thus, potentially, eliminate all harvesting (ibid.:62).

The Board, itself, will operate under a form of delegated authority. Hence, the Minister responsible will have the right to review its regulations for the purpose of conservation and, potentially, to overturn its decisions. As well, the Minister may limit or prohibit Dene/Metis harvesting in the interests of ‘public safety or public health’ (ibid.:60). Finally, Dene/Metis harvesting can be limited or eliminated because it is subject to any legislation ‘re-
specting the humane harvesting of wildlife (ibid.:59) and ‘for the protection of the environment from significant damage’ (ibid.:60).

It is clear from the above that the Harvesting Agreement provides significant tangible benefits to the Dene/Metis. However, ultimately, Dene/Metis harvesting can be eliminated when confronted with the problems of environmental damage, the demand for a ‘humane’ approach to harvesting (as defined by government legislation) and the demands of conservation. Hence, it is clear that the harvesting objective is subservient to the conservation objective. Conservation, as the above attests, is clearly seen as ultimately the responsibility of the state. This is a point which is further underscored in the Dene/Metis AIP: ‘nothing in this agreement is intended to confer rights of ownership in any wildlife’ (ibid.:53).

The Philosophy of the Written Version of the Dene/Metis Harvesting Agreement

The written version of the Harvesting Agreement, closely follows Euro-Canadian cultural values and hence those of the government side in the negotiations. To illustrate this, it is useful to begin by examining how the concept of ‘wildlife’ is defined in Euro-Canadian dictionaries. According to Webster (1966:2616), ‘wildlife’ means ‘living things that are neither human nor domesticated; especially: the mammals, birds and fishes that are hunted by man for sport or food’. The term ‘wildlife,’ it is pointed out, is analogous at some level to ‘game’ a word which Webster’s suggests denotes ‘animals under pursuit or taken in hunting’; (or) ‘animals considered worthy of pursuit by sportsmen; especially wild animals taken for sport or food’. Although this is not made explicit, I would presume wildlife and game live in the ‘wilderness’ (ibid.:2615) which is defined as ‘a tract or region uncultivated and uninhabited by human beings’.

The term ‘wildlife’ is opposed in Webster’s Dictionary to the word ‘domesticated’ which is defined as (ibid.:671) ‘adapted to life in intimate association with and to the advantage of man, usually by modifying growth and traits through the provision of food ... and selective breeding’. Thus, according to Webster, there is a binary opposition between two fundamental categories of non-human animals: ‘wildlife’ and ‘domesticates’.

Curiously, the word ‘wildlife’ does not appear in the Oxford Dictionary. Nonetheless, a similar opposition does exist when one begins with the word ‘wild’. According to the Oxford Dictionary (1976:121–3), among the definitions of ‘wild’ the first is: ‘of an animal: living in a state of nature; not tame, not domesticated’ (emphasis added). References to this usage go back to 725 A.D. Also included are such associated meanings as: ‘produced or yielded by wild animals or plants; produced naturally without cultivation; sometimes having the characteristic (usually inferior) quality of such productions’; and ‘of a place or region: uncultivated or uninhabited; hence waste, desert, desolate’ (e.g., a wilderness); and ‘of persons (or their attributes): uncivilized, savage; uncultured, rude; also, not accepting, or resisting the constituted government’.

An abverse can again be found in the word ‘domestic’ (ibid.:593). Here, among other terms is: ‘of or pertaining to one’s own country or nation; not foreign, internal, inland, “home,”’; and, more particularly: ‘Of animals: Living under the care of man, in or near his habitations; tame, not wild’. This term goes back at least to the early 17th century. These usages, it should be noted, follow closely those found in Johnson’s Dictionary. Thus, in the Oxford Dictionary as in Webster’s, there is a binary opposition between the concept ‘wildlife’ and the concept ‘domesticate’ when referring to animals. This opposition, in my view, provides an important component for the ideological basis of the ‘Wildlife’ Agreement.

When examined from the perspective of
ownership, the contrast between the terms ‘wildlife’ and ‘domestic animal’ reveals an important ideological component with respect to the animals referred to in the Dene/Metis Harvesting Agreement. In particular, it is clear that in our ideology, domestic animals are owned privately. Who, then, owns wildlife prior to capture? To begin with, certainly not the Dene/Metis for, as mentioned above ‘nothing in this agreement is intended to confer rights of ownership in any wildlife’ (ibid.:53). Nor is it ‘no one’ as the dictionary definitions might imply. Rather, as Peter Usher suggests, it is the state (1984:401):

Canadian law does not recognize the right of ownership in any wild animal or fish until it is captured. These resources are therefore called common property resources, and their management and regulation is the responsibility of the state on behalf of its citizens. Common property is thus, in effect, state property.

That wildlife is state property can be easily corroborated by reference to current game laws (McCandless, 1985; and also Gumbert, 1984 for Australia). Thus, for example, the Alberta Game Law declares in part 2 ‘Relationship of the Crown to Wildlife’ of its Wildlife Act that ‘... of the property in all wildlife in Alberta is vested in the Crown’ (Alberta Statutes, 1984:9). In the North, by the same logic, wildlife is owned by the federal Crown.

Although the Crown owns wildlife, it does not act as though it were a ‘private’ owner and hoard the hunting to itself (although for earlier periods, see below). Rather, it follows the ideology of the culturally relevant definition of ‘wildlife’ as exemplified in the dictionary definitions cited above and acts as though such species were unowned and living in a wilderness. Hence, it acts as though it were a manager whose responsibility is to ensure that such species continue to exist and that, when possible, a certain portion of their populations may be harvested. Hence, it issues licences to hunt; legislates on such matters as legal seasons to capture game animals and bag limits; and takes responsibility for ensuring the preservation of species through conservation measures. Further, given that Canada is a liberal-democracy with majority rule, governments (acting on behalf of the Crown), all things being equal, will operate to ensure the widest possible access for all hunters without regard to race, religion or any other ‘discriminatory’ matters. Thus, its actions confirm the culturally sensitive idea that wild animals are a common property resource which is managed for the common good which, given the time in which we live, is defined as the good of the majority.

In terms of ownership, then, as the above indicates, wildlife differs from domestic animals in Euro-Canadian ideology in one important respect: a private individual can own domestic animals but, until it has been captured, not wildlife. From this it follows that whereas persons who own what are defined as ‘domestic animals’ can, within some bounds, dispose of their property as they see fit without regard to season or bag limits and can obtain compensation when their property is damaged or destroyed, a person who hunts wildlife can do none of these things, for it is the Crown and not the individual who owns these animals, until they have been legally harvested.

In short, there appears to be an homology between Euro-Canadian ideas about wildlife and the terms of the Dene/Metis Agreement respecting ownership and hence responsibility for wildlife. The question is whether the homology can be extended to the aboriginal side.

Defining the Animals the Dene Hunt

If we begin with the terms ‘wildlife’ and ‘domesticate’ as they have been defined in the dictionaries, then, at least at first blush, evidence indicates that the Dene must hunt wildlife for they do not have any domestic animals, except for the dog and this is never used for food. Furthermore, the Dene do not have ‘domestication’ in the classical an-
thropological sense for they do not manipulate animals 'to such an extent that genetic changes have occurred resulting in new races or species' (Bender, 1975:1). Indeed, as would be appropriate were the animals on the land conceptualized as 'wildlife,' they commonly state that 'no one can own an animal that has not been captured'.

The Dene also accept the view that captured animals become the property of the particular individuals and/or groups who harvested them. This would again appear to re-enforce the notion that Dene concepts of animals on their land replicates the Euro-Canadian notion of 'wildlife'. However, although there are parallels, their concept is not identical, for the terms whereby ownership is claimed are sometimes at variance with the way in which Euro-Canadians would assert a property right. This point was brought home to me through a particular dispute about the ownership of a moose between two senior males from the community of Wrigley. The dispute arose as follows. These men had been partners for years and on this occasion were on a long, cold and relatively unsuccessful foray. One morning, a moose appeared in a spot that was particularly advantageous to one of the hunters. He dispatched it and claimed it as his. The other individual disagreed. He claimed that the particular animal was his because he had dreamed and therefore predicted that the animal would appear at that particular place and time and would be shot by the other. The dispute remained unresolved, but, as is normal, the meat was shared between the families of the two men. This incident, as well as reports by such ethnographers as R. Slobodin (1962) respecting trapped animals, does indicate that there is a transformation between animals before and after they have been harvested which the Dene use to identify particular owners once an animal has been captured. It also indicates that a claim to the ownership of an animal can be asserted before the animal has been physically captured.

Closer examination of some data further reveals that the idea of 'wildlife' may not be appropriate as a way to describe Dene concepts of the animals they hunt. It is true, as I stated above, that Dene say 'no one can own an animal that has not been captured'. But this does not mean that the animal is unowned. What is meant can be better understood by studying some of the analogies Dene use when describing their land and the animals on it to non-Dene. For example, it is common for Dene to draw an analogy between their land and a 'bank' as in the statement made by Chief J. Charlie of Fort McPherson 'The delta is the bank to the trappers and hunters' (Asch et al., 1976) or to describe their land as a 'a store house' as in the following comment by Chief Kodakin of Fort Franklin in discussing Great Bear Lake (ibid.): 'The whole lake is like a deep freeze for Fort Franklin. Our ancestors have used it as a deep freeze and we will use it as a deep freeze for the future children'. These comments plant the impression that the Dene see their land as a repository for the animal and plant life upon which they rely and that this repository is theirs exclusively. It is a concept that differs greatly from the dictionary idea of 'wildlife' living in a 'wilderness'.

We can go further than that. It is true that there are few recorded statements that explicitly link Dene notions of ownership directly to the animal populations on their land. But there are some. Two of these, made by Dogrib chiefs and collected in the process of gathering information on Dene land use for their aboriginal rights claim, lay out the proposition clearly. The first by Louis Moosenose of Lac La Matre suggests: 'This land was given to us to make our living for food, clothing and income ... The land was given to us to look after it and the land was supposed to be protected. The land, the water, and the animals are here for us to make a living on it, and it's not to play with' (Watkins, 1977:22). The second is this unequivocal statement made by Amen Tailbone of Rae Lakes who said (ibid.: 22):
The animals is our food, the land is our everything and the water is our drink so the land is ours to keep as long as the sun is shining. The game wardens should not give hunting licenses to their friends, because they do not kill animals for food, they kill animals for sports. The land, the water, and the animals are not here to play with.

These statements clearly indicate that Dene do not define these animals as ‘wild’ or as ‘wildlife’ in the dictionary definition sense. Rather, although Dene will often say that animals in the wild belong to ‘no one,’ what they appear to mean is that they do not belong to any one individual before capture. In the first instance, these animals belong to the Dene as a whole (‘the animals is our food’). In large part the ownership of such uncaptured animals derives from the fact that they dwell, not in a wilderness, but on Dene land. The Dene draw a moral sense of ownership from the fact that, unlike sports hunters, rather than ‘play with’ the animals, they use them for food. In short, it would seem that the Dene perceive themselves as ‘owning’ the uncaptured animals on their land not as individuals but as a collective.

Thus, despite initial impressions, it appears that Dene explanations of the status of animals on their lands come closer to what the Euro-Canadians call ‘domesticates’ than to ‘wild-life’. That is, Dene describe those animals as ‘adapted to life in intimate association with and to the advantage of man’. The boundaries of the land within which ‘intimate association’ exists may be enormous by Euro-Canadian standards, but it is still an intimate association. Indeed, this is invariably the case for the vast landscape is transformed into small worksites through the actual practice of setting up camps, capturing game and preparing meat. Furthermore, the Dene appear to conceive that, on their lands, they own the animals they hunt collectively, even before capture. Indeed it would seem to follow that, in all respects save the manipulation of the gene pool, the Dene relate to the animal populations they hunt as domesticates rather than wildlife. It is thus consonant with neither their concepts nor their interests for the Dene/Metis to accept a framework for negotiations according to which the animals they hunt are defined as ‘wildlife’ as that term is understood either in Canadian law or normal English discourse.

The Wildlife Agreements: an Evaluation of Ideology

As the foregoing suggests, there are profound differences between the way in which Dene explain their relationship to the animals they harvest and the ideology of the Agreement itself. Most striking is the fact that the Agreement defines the animals as ‘wildlife’ and hence suggests that they are owned not by the aboriginal people but by the state. Given this orientation, the state, as acknowledged owner and manager of these animals, must see itself as having made major concessions to aboriginal interests, for yet its liberal-democratic mandate to work for the good of the majority, it has acknowledged specific rights to these animals to a particular segment of the population. Inasmuch as the general public subscribes to this view, they likely see government as generous, if not overgenerous and would certainly not be amenable to the idea that aboriginal people could garner more rights. Indeed, in the North, this type of conflict is now developing for the non-Native dominated locals of the hunters’ and trappers’ associations are organizing to prevent even the degree of special status provided in the Dene/Metis Harvesting Agreement being realized. They are doing so on the basis of a philosophy that wildlife is truly a common property resource.

However, we must look at the issue from the aboriginal perspective as well. From their point of view, they have obtained some concessions, but in the process have had to accept working within a paradigm that is external to their ideology and yet to find ways within it to obtain some of the
rights and guarantees they see as properly theirs. This, it is clear, was no mean feat. But, I would argue, it had a cost. In so doing, the aboriginal parties have had to give ground on fundamental points. In particular, they have had to accept that what they hunt is 'wildlife'. They have therefore conceded that the animals they harvest belong to a Euro-Canadian category rather than to one of their own making. Conceptually, the use of this term implies the acceptance of the idea that these animals ultimately belong not to the Dene/Metis but to all Canadians and that they are owned either by no one until captured or, following the definition found in legislation, are owned by the state until legally harvested. Practically, by adopting the term 'wildlife', the Dene/Metis have apparently conceded both the principle which derives from their conceptual framework that they have the right to manage, cull and conserve the animals they hunt independently of the state, and the right that would flow from an acceptance of their framework in Canadian law that, as owners, they could obtain compensation for the loss of such animals even prior to their capture. Concern over such concessions, in my view, is one important factor that motivates the animosity of the Dene and other aboriginal peoples to having government or any agent other than themselves as the ultimate authority with respect to management, seasonality, bag limits, conservation or any other matter with respect to the animals on aboriginal lands.

Towards an Alternative

As the above discussion indicates, the Harvesting Agreement is framed within an opposition between 'wildlife' and 'domesticates' which derives expressly from the cognitive organization of the descendants of the colonists. From this perspective, it is clear that the animals hunted by Dene/Metis are not 'domesticates,' but 'wildlife'. On the other hand, for the Dene/Metis who do not have 'domesticates' in the Euro-Canadian sense, the opposition is not appropriate. Rather, the evidence indicates that they see the animals as belonging to a category that one might label 'owned wildlife' or 'genetically unmanipulated domesticates'.

As the terms of the Dene/Metis Agreement suggest, it is the framework of the descendants of the colonists that has taken precedence in the negotiations. This has not gone unnoticed by many scholars as well as aboriginal people and there have been some attempts to accommodate aboriginal concepts of ownership within such agreements. Here I would like to discuss some possibilities that have been advanced.

The most highly developed thus far has been the idea of 'profit a prendre'. This notion, which derives from English common law, 'means not simply the right to hunt and fish, nor even the sole right to do so in the area of the grant, but also the right to enjoy the fruit (or "profit") of these resources, which is in principle measurable and predictable' (Usher, 1984:411). As Usher suggests, implementation of this arrangement would have significant benefits over the present system for it would indicate that the aboriginal people have some sort of an interest in wildlife even before it has been harvested. A second and somewhat weaker solution which I have advanced is for the Dene/Metis to declare that, for the purposes of hunting, the claim area is to be considered a private ranch. This would provide aboriginal peoples the exclusive right to hunt, but unlike the 'profit a prendre' position, it would not guarantee them the right to profit materially from their act and to receive compensation if they were unsuccessful.

These solutions, and especially the 'profit a prendre' alternative, are attractive in that they offer answers to some specific concerns and yet do not challenge the basic paradigm within which agreements have been formulated up to this time. As such they have the advantage of providing some practical resolution without generating conflicts that are anticipated where issues
of fundamental philosophy are raised for debate in negotiations. However, in my view, the focus on the practical over the philosophical also has significant costs. Of these, the most important is that the education of both parties, but especially of government and the larger public concerning aboriginal perspectives, is impeded. As a consequence, the creative thinking necessary for a resolution based on mutual accommodation becomes inhibited. The balance of this paper is devoted to the description of one possible means by which Dene/Metis and Euro-Canadian philosophies about the ownership of 'wildlife' can be mutually accommodated within a single paradigm. Specifically, it will briefly outline three possible analogies between Dene concepts about the ownership of the animals they harvest and propositions developed at different times in Canadian and English law concerning the ownership of wild and domestic animals.

Wildlife and Canadian Law

The contemporary Canadian concept of ownership in wildlife as outlined above is of recent vintage. As McCandless points out (1985:18–20), it was not until the decimation of the buffalo in the latter part of the 19th Century that control by the state for the purpose of conservation became a driving force underlying legal philosophy. As McCandless says (ibid.:21):

Reforms made in the nineteenth century provided concepts of limited access; that is, all men (with a license) may hunt some of the time. This has been the principle behind North American game laws ever since. By selling licenses, the government acts both as game keeper and a vendor of hunting rights and makes no distinction between those who hunt for pleasure and those who hunt for food.

However, we gain no parallels to the Dene/Metis case from an examination of the earlier period of Canadian law for, until the latter part of the 19th Century, the colonial population acted as though wildlife were owned by no one, not even the Crown. As McCandless (1985:13) states:

The early immigrants to North America would have resisted any attempts by colonial administrators to deny them access to land and wildlife. The promise of abundant wild meat had a wide appeal to those driven from the land by enclosures or the effects of the Industrial Revolution. An added inducement lay in the promise of economic gain based on wildlife such as the traffic in furs, hides, and meat. The immigrants hunted without restriction as to harvests and shooting seasons, for such restrictions would have conflicted with the expansionist philosophy of the age as well as with the economic activity.

Thus, in this context, although it had the prerogative under English law, the state, with few exceptions (one of them being the Royal Proclamation of 1763 in which the King reserved certain Hunting Grounds to Indians – for further discussion see note 8 below), did not assert its legal standing to regulate game through the passage of any hunting laws.

It is clear, then, that, were we to limit our discussion to concepts about wildlife as they developed in Canada, we would find no conceptual parallel to the situation where what we now call 'wildlife' could be owned prior to capture. Rather, we have an orientation that moves from a chaotic, unregulated regime in which wildlife is not considered to be owned prior to its capture to one in which the idea is that, until taken, wildlife belongs to the state and is to be managed by the state as a common property resource.

Wildlife: Some Perspectives from English Law

A different picture emerges when we examine the history of English game laws concerning wildlife. It is true that in the 20th Century game laws appear to reflect some of the universalistic and conservationist
values found in the Canadian concept of Crown control (British Statutes, 1971) and that in the period prior to 1066 the Roman theory that ‘wild animals belonged to no one until they were killed or captured’ may well have prevailed (McCandless, 1985:2). However, if we examine the period from 1066 to at least 1831, two regimes emerge, each of which presents some good analogies to the concept of the ownership of wildlife described for the Dene.

The first regime began with the Conquest in 1066 and the claim by William the Conqueror to all of England including ‘all forested and unoccupied areas’ (McCandless, 1985:3). As is well known, William and his successors were extremely fond of hunting and to that end set aside vast tracts of land as sporting preserves ‘within which no person might hunt without his permission’ (Munche, 1981:9). According to Munche (1981:11f), during this period the king had two prerogatives: ‘to hunt wherever he pleased and to take such measures for the preservation of the game as he thought fit’. Thus, as the Shelburne manuscript document concerning a royal enclosure struck in the 18th Century stated (Cross:1928:37):

The Forests in England are of very ancient date. Hunting was the great passion and amusement of the first savage and illiterate ages of this Country; and the power of the Crown, especially in the times immediately subsequent to the Conquest, not being under any certain limitation it was perhaps more freely exercised on this than any other subject.

In short, it was the period when, according to Munche (1981:10), the legal theory was ‘that the Crown claimed that all the game in England was the property of the king’; in particular, this meant the personal property of the king. Thus we have a circumstance where the uncaptured wildlife was privately owned, albeit by the sovereign.

The second period begins in 1671 and lasts at least until 1831. With the Game Act of 1671, the Crown ‘ceased to be the source of sporting priviledge’ (Munche, 1981:14). It was the Game Act itself that provided legitimacy for hunting and, while it did not explicitly deny the king’s personal rights, it granted similar rights to the gentry and gave them responsibility equal to that of the king for preserving game.

Of specific interest is how the Acts in this period treated ‘wildlife’. According to Munche (ibid.:3–5), ‘game’ (which we might equate with wildlife) was limited to hares, partridges, pheasants and moor fowl. Such animals as deer, rabbit, wild ducks, foxes, otters or badgers were not considered ‘game’ in the same sense. For some animals, like badgers, otters and foxes, this was because they were considered ‘vermin’ and hence, as their destruction was considered beneficial to the community, they could be hunted by anyone. These animals could easily fit within the contemporary definition of wildlife.

However, the case is different with respect to deer and rabbits. These animals which would properly be classified as ‘wildlife’ under contemporary Canadian law were not so considered during the period 1671–1831 (ibid.:4). The particular reason for this, with respect to deer, was the fact of ‘enclosure’: the system whereby ‘wild animals were confined to a specific area where they were bred and nourished until the landowner permitted them to be hunted and killed’ (ibid.:4). Because of ‘enclosure,’ Munche suggests (ibid.:5) that deer were seen as a type of private property and were entitled to legal protection as such. Thus, we find that in the period 1671–1831 a private individual who was not the sovereign could own what we would call ‘wildlife’ prior to its capture.

Discussion

It is not my intention to argue that there is a direct parallel either between English notions of sovereign ownership or the rights of private individuals respecting enclosed wildlife and Dene concepts. However, the use of parallels from English law can help in furthering the understanding of the na-
nature of Dene/Metis claims regarding wildlife.

With respect to the issue of sovereign ownership, it is well-known that Canadian aboriginal people see themselves as retaining political rights of self-determination despite the assertion of Canadian sovereignty. These are rights they see as being exercised through the development of a political accommodation within Canada. There has been a tendency to see these rights as exclusively political and, hence, pertaining only to such matters as constitutional guarantees with respect to self-government. But they are not limited to that. Aboriginal leaders often assert that their political rights relate equally to economic matters including property. When one hears discussion on rights such as 'aboriginal title,' it is reminiscent not of 'fee simple' title, but rather of parallels to the situation of the king, prior to 1671, with respect to, for example, wildlife. However, instead of the sovereign being an individual, it is a collective: an aboriginal collective. Thus, as Clem Chartier said: (Asch, 1984:28): 'What we feel is that aboriginal title or aboriginal right is the right to collective ownership of land, water, resources, both renewable and non-renewable'.

In this circumstance, wildlife would be considered a resource collectively owned by, for example, the Dene/Metis. Hence, any agreement that defined it as a 'common property resource' to be controlled by the state for the benefit of Canadians as a whole, even were it to include some special provisions for aboriginal hunting and management, would be considered something of a reduction from the underlying philosophy of that title.

The idea that wildlife can be privately owned before capture, as is found in English law between 1671 and 1831, also bears on this discussion. Of course, if one places exclusive emphasis on the idea that the animals in deer parks became property because, being 'bred and nourished', they became 'semi-domesticated,' then there would appear to be no parallel to the Dene case for, despite the management that takes place to sustain harvests, the animals which Dene collect are not 'semi-domesticated'. However, when one focusses on the issue of known-boundaries as being the defining characteristic for ownership, a different picture emerges. Like deer parks and enclosures, Dene have ranges within which they routinely hunt. These territories run the gamut from the national boundaries of the Dene as a whole to the ranges of the local bands. These local bands, it should be noted, are defined in Dene languages not on the basis of descent, but rather on the basis of location: for example, 'the people of Willow Lake'. In this view, a place like Willow Lake would be seen as a bounded area within which a certain collective of Dene hunt, fish and trap and, under normal conditions, do so exclusively. In this sense, it is conceptually analogous to an enclosure. Similarly, there is a bounding of ranges between Dene bands when it comes to following migratory animals, so that, for example, the people of Fort McPherson will track one caribou herd, while the people from the neighboring community of Arctic Red River will track another. However, this is not to suggest that the local bands 'own' the animals exclusively, for in a more general sense (as the citations from the Dogribs mentioned above indicate), the animals are considered to 'belong' to the Dene/Metis as a whole. Thus, I would argue it is reasonable to consider conceptualizing the entire territory of the Dene/Metis to be like to an enclosure.

In a current context, this parallel would suggest that the animals hunted by the Dene/Metis are more closely analogous to what Euro-Canadians call 'domesticates' than to 'wildlife'. This proposition would be supported by current Dene/Metis practice for, as is typical with domesticates:

(1) the animals the Dene/Metis hunt are essential for their subsistence
(2) the Dene/Metis have the intimate knowledge of these animals ascribed to the ownership of domesticates and
the Dene/Metis consider that they 'own' them.

To call these animals 'domesticates,' then, is to suggest that the category 'wildlife' should be relegated in Dene/Metis society, as it is in in Euro-Canadian, to those animals that are peripheral to subsistence.9 Finally, were Canada to accept this point of view, on a practical level the Dene, Metis, and other aboriginal nations, would gain control over the the right to control management and harvesting without the direct intervention of the state.

Conclusions

The current Dene/Metis Harvesting Agreement states as objectives both the exercise of aboriginal harvesting rights and the conservation of species found in the settlement area. Although, to achieve these objectives, a Management Board which includes a significant number of Dene/Metis members has been struck, the rules under which it operates assume that the ultimate authority to regulate Dene/Metis hunting is in the hands of a Minister of the Crown.

Key to rationalizing this assumption are the assertions found in the AIP that the animals the Dene/Metis hunt are 'wildlife' and the statement that the Agreement does not confer rights of ownership in these animals to the Dene/Metis. Were these assertions accurate reflections of Dene/Metis concepts and interests, then the rationalizations would be appropriate. At first blush, it might appear that they are, for the Dene do not own domesticated animals nor do they often assert that they see themselves having a proprietary interest in the animals they harvest. Indeed, some (including Dene/Metis) will assert on the basis of good information that the idea of ownership in animals is foreign to aboriginal concepts. However, evidence revealed when the Dene explain relations between people about animals to non-Dene (as may occur in court cases or inquiries) and when settling disputes among themselves indicates ideas akin to the presumption of a proprietary interest in animals even prior to their capture.

In this paper, I have suggested four avenues through which this interest could be reflected in the Dene/Metis Harvesting Agreement without violating fundamental principles of Euro-Canadian folk and legal ideology about 'wildlife' and its ownership. Two of these, 'profit a prendre' and the notion that the animals are like wildlife on a ranch, do not challenge the existing control exercised by the state over 'wildlife'. The other two do confront this control. The first, through the analogy to sovereign ownership akin to that held by the kings of England prior to the mid-17th Century, does so by asserting that control over wildlife in the settlement area is a matter to be placed in the hands of a constitutionally recognized Dene/Metis Crown. The second, arising out of the notion of enclosure and its consequences, as well as parallels to current Canadian law, challenges state regulatory authority by transforming the category of the animals which the Dene/Metis harvest from 'wildlife' to 'domesticate' and hence out of the direct jurisdiction of the Crown.

Clearly, then, the difficulties which the Dene/Metis and other aboriginal nations face in negotiating for fuller recognition of their concepts and interests regarding the animals they harvest do not arise because of some fundamental, unbridgeable cultural gulf between aboriginal ideas and those of Euro-Canadians.10 Rather, the essential difficulty lies in the lack of political will on the part of Canadian governments to use tools already available to provide a resolution to aboriginal rights claims in terms more consonant with the concepts and interests of the Dene and Metis of the Northwest Territories, as well as those of many other aboriginal nations.

Notes

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Dick Spaulding and Sal Weaver for their helpful comments on earlier drafts of this paper.

1 I realize that, especially through Treaty rights (Asch, 1984:118), some aboriginal nations have gained recognition by the Crown of a special right to harvest wildlife. This can include rights to hunt when it is out of season for others and that any law regarding conservation must be justifiable in order to secure the needs of these aboriginal nations (Rex vs. Wesley, 1932). However, these rights, as perceived by the Crown, are not based on the idea that these aboriginal peoples have an ownership interest in wildlife. Furthermore, from the statements 1/ that Dene/Metis do not own wildlife and 2/ that the Dene/Metis right to hunt is subject to conservation, it is clear that the agreement under discussion in this paper is intended to make Dene/Metis rights conform more closely to the ideology described above than may be the case with respect to the right to harvest wildlife as described in treaties and interpreted by the courts.

2 Before undertaking this task, I wish to make it clear why I am using the terms ‘property’ and ‘ownership’ to describe one particular aspect of the Dene/Metis relationship with their lands and with the animals they hunt, fish and trap. I realize that many would see these terms as culturally specific and hence inappropriate for such use and might wish to employ the terms ‘management’ or ‘custodianship’ to describe the relationship I outline here. I agree that the view of ownership that is inappropriate to describe Dene/Metis concepts is the one that derives unimaginatively from Euro-Canadian notions of the absolute right to dispose of one’s possessions without regard to the interests of others or of future generations. I believe that the adoption of ‘management’ or ‘custodianship’ derives in part at least from a prior acceptance of the above idea of ‘ownership’ and an attempt to distance from it. Yet it is a narrow definition that does not operate in all spheres of ‘property’ even in Euro-Canadian society. On the contrary, I would argue, following Bloch (1975: 204), that property relations exist in all societies, but that different societies represent these relations differently. I suggest that there is a culture specific form of property ownership that carries with it the responsibility that the land and the animals on it as a whole flourish while in the possession of its owner and that it is, furthermore, the responsibility of ownership to nurture what is owned for future generations. While this is like ‘management’ or ‘custodianship’ as we would define these, the use of ‘ownership’ or ‘property’ goes further for in my view it asserts that management is not merely a function that is added on to possession but is part of possession itself. Furthermore, it is clear from observations, discussions and comments advanced by Dene/Metis that they speak of the relationship between themselves and non-Dene regarding their land and the animals on it in terms that are strikingly similar to the notion of ‘exclusivity’ one would find in the notion of ‘property’ and ‘ownership’. Thus, for example, in Paulette vs. R., Mr. Sutton asks (Paulette Proceedings 1976: Book 2:125): ‘If a number of white people came into your area without your permission, how would you feel about that, your hunting and trapping area?’ And receives the following reply from Chief Daniel Sonfere (ibid.): ‘If such a thing is going to occur, they should consult with me, and I will consult with my people and there will be a decision made in such a thing, but they should never just barge in like that.’ Clearly a statement such as this represents a strong indication that the Dene/Metis view the lands upon which they hunt not as a vast wilderness open to all, but rather as something over which they hold ultimate authority.

3 The sources of my data are derived primarily from the observations made by myself (Asch, 1988) and Shirleen Smith, reports by other fieldworkers, and statements made by Dene hunters especially during the course of the Berger Commission hearings (1974–77) into the Mackenzie Valley pipeline.

4 The Dene/Metis descriptions and analogies expressed here all derive from formal situations such as the Mackenzie Valley Pipeline Inquiry. The Dene/Metis communicated their ideas in these settings either in English or in a Dene language with the express understanding that their words were to be translated into English. Thus, they were prepared primarily for the non-Dene listener and for a formal setting. Strictly speaking, one can say that the words as they appear in English represent one means which Dene/Metis speakers use to clarify for non-Dene how their concepts differ from those held by Euro-Canadian society.

5 This view was expressed most concisely by George Barnaby, a Dene hunter-trapper, who said at the Fort Good Hope community hearings of the Mackenzie Valley Pipeline Inquiry (MVPI, 1979: 22003f): ‘Our life is part of the land. We live on the land and are satisfied with what we get from it. No one owns the land. It belongs to all of us. We choose where we want to go and our choice is respected by others whether in the settlement or in the bush. We have no word in our language that means “wilderness,” as anywhere we go is our home.’

6 In other words, whereas a right to hunt only provides its possessor with an opportunity to undertake that activity, a ‘profit a prendre’ right includes both the right to undertake the activity and the right to expect that the activity will lead to the success, say in the harvesting of animals. This ‘right to succeed’ can be measured, for example, on the basis of the success of hunting in previous
years. Hence, for example, should some disturbance diminish that success, the possessor of this right, unlike someone who merely possessed the right to hunt, would have the clear right to compensation based on the extent to which the fruits of harvesting had been reduced.

7 It is interesting to note that during this period, the ritualized aspects of hunting bore some resemblance to practices found in other cultures, including the Dene. According to McCandless (1985:7): ‘Persons received cuts according to their status, so the chief huntsman received the muzzle, tongue, ears, sweet guts (sweet breds), and testicles, the foresters took the shoulders, the hound master the hide … while the chief Huntsman or Master of the Hunt would apportion the remainder according to his own or custom’s choosing. Even the ravens had a piece reserved for them, the os corbin, while the all-important dogs were fed the entrails with even more ceremony and horn blowing.’

8 This approach was perhaps actually taken by the English themselves. One must remember that the Royal Proclamation of 1763 was published in the middle of the period in which deer and other enclosed animals were considered private property and it stated (Clark, 1987:97f): ‘And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as the Hunting Grounds.’ Given the context, it is reasonable to consider that concept of ‘hunting grounds’ in the Royal Proclamation was similar to the idea of ‘enclosure’ as discussed above and hence that the intent of the Proclamation was to confirm the exclusive right of the aboriginal nations to the animals on those lands. However, this is a matter that will require further discussion.

9 In this view, the concept of ‘wildlife’ might well exist in foraging economies as well as in those with domesticates, however, it would represent a residual category that implied that the animals so named are not important to subsistence and/or are not considered property. In this view, the animals that were the focus of subsistence in any society would be termed ‘domesticates’. The problem is that this reasoning would negate an important fact in history: the rise of what we might call true domestication. Therefore, I would think that another word would need to be used to describe the situation among foragers. Needless to say, this term would not be ‘wildlife’. That anthropologists have spent little time on this issue is not surprising. True domestication (as defined by genetic manipulation) stands out in the historical record as a major incident in human history and, as such, most studies within the evolutionary paradigm have focussed on understanding that fact. However, in doing so, anthropologists have left themselves with a very poorly developed model of how foragers relate to the animals they harvest, especially from the perspective of property. This model, I would venture, replicates in many ways the ethnocentric folk category ‘wildlife found in western society’. As a result, anthropology can neither provide much guidance to those who would attempt to define a more reasonable term than ‘wildlife’ upon which to base claims agreements nor can it develop as fully sophisticated a model as possible to explain the emergence of true domestication.

10 From a legal standpoint, it must be remembered that the current test as to whether an aboriginal usage or custom should be recognized by Canadian courts flows from the statement made by the Judicial Committee of the Privy Council in 1919 regarding the rights of the indigenous people in Southern Rhodesia. In it, Lord Sumner said (Southern Rhodesia, 1919:233, quoted in Asch 1984:43): ‘The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the ideas of civilized society. Such a gulf cannot be bridged … On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have (been) studied and understood they are no less enforceable than rights arising under English law.’ Thus, the argument advanced here would support the notion that Dene/Metis concepts fall into the second category as defined by Lord Sumner rather than the first.

References
— et al. (1976) The People Speak, This Magazine.


Chrétien, Jean (1973) Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development, on Claims of Indian and Inuit People. Ottawa: DIAND Press Release, August 8, 1973.

Clark, Bruce A. (1978) *Indian Title in Canada* (Toronto: Carswell).


Department of Indian Affairs and Northern Development (DIAND) (1978) *The Northeastern Quebec Agreement [Naskapis of Schefferville Band, Quebec]* (Ottawa: DIAND).


In re Southern Rhodesia [1919] AC 210 (PC).


*Rex vs. Wesley* [1932] 4 D. L. R. 775 Alberta Court of Appeal.


